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In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 5, 1951 (R 2225).

OPINION BELOW

The opinion of the District Court denying Motion for New Trial (R 116 ff.) is reported in 92 Federal Supp. 750. The majority and dissenting opinions of a panel of three judges of the United States Court of Appeals for the Ninth Circuit are not yet reported (R 2204 ff.; Appendix A hereto).

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1951 (R 2225). A petition for rehearing and rehearing en banc, filed in time, was denied on January 23, 1952 (R 2226). The jurisdiction of this court is invoked under Title 28 U.S.C.A. Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether, in the trial of a case in a United States court, counsel may, with impunity, indulge throughout the trial in a planned and consistent scheme of appeals to passion and prejudice of the jury.

2. Whether, when such a departure from the accepted and usual course of judicial proceedings has resulted in a grossly excessive verdict, that verdict can be permitted to stand.

3. Whether the decisions of this court in *N. Y. C. Ry. Co. v. Johnson,* 279 U.S. 310 and *Moquin v. Minneapolis etc. Ry. Co.,* 283 U.S. 520, 75 L.ed. 1243 are to be emasculated and brushed aside by assuming the jurors were not misled by constant appeals to passion and prejudice through the introduction of inflammatory matter under the guise of unsupported "impeachment" cross-examination upon the assumption that jurors have intelligence enough to know (a) that if a party has evidence to impeach a witness he will produce it and (b) that statements, in the form of impeaching questions, in support of which no evidence was produced, were to be disregarded—when a grossly excessive verdict demonstrates that the assumption is wholly unwarranted.

4. Whether the trial court's failure to give relief on motion for new trial should be corrected because the trial court misconceived its function.

STATEMENT

Respondent brought this action against Bradley Mining Co. and John Bradley, its Executive Vice-President, for $50,000 for damages for false imprisonment and $100,000 damages for slander (R 3-13). No special damages were alleged or proved. The cause was concluded in favor of the individual defendant (R 2187) and by a verdict against the corporate defendant, the petitioner here, for $60,000 (R 109). Motion for new trial was denied (R 116 ff.). The appeal to the Court of Appeals for the Ninth Circuit was submitted to a panel of three—Judges Healy, Bone and Pope. The judgment was affirmed by two judges—Judge Pope dissenting (R 2204 ff.; Appendix A hereto). A petition for rehearing and a hearing en banc before the seven judge court was filed and denied by the same two judges who had affirmed the judgment (R 2226). The dissenting judge's characterization of the whole case was:

> "In my opinion a very thin case has here been whipped into a monstrosity".

The dissent was on the ground that the verdict was excessive and was the result of appeals to passion and prejudice, which that opinion states and documents in detail. The most that the majority could say of this conduct of counsel was:

> "One need not approve tactics of this sort in order to reject appellant's argument."

These opinions are attached in Appendix A hereto.

To understand the point of the foregoing a summary statement of matters which occurred over a period of more than nine months and which were made to appear at a five-week trial is necessary.

Stibnite is a small mining town in a remote region of the mountains of Idaho. The streets and alleys were public but the rest of the property was owned by Bradley Mining Co. and, with one or two exceptions, the inhabitants were employees of the company or members of the families of employees. The employees, in matters of common concern, dealt with the company through a formally constituted "Employees' Representative Committee" (R 374-384, 405, 406).

Agreeably to the Idaho statutes (Idaho Code 72-397 to 72-309) the company and the employees had entered into a contractual plan for medical service, and a second plan covering wives and children of employees. In 1943 the company opened a hospital at Stibnite. All the company's employees and members of their families were members of the medical plans.

Respondent, a doctor licensed to practice in Texas, and a stranger to Stibnite, began service March 1, 1947, as the doctor in charge of the Stibnite Hospital. At first he seemed to do well enough. But at the end of about three months marked laxity and inattention to duty began to manifest itself. The record is filled with general statements and specific instances in too much detail for summary here. Patients' complaints began in July. Eventually the matter was taken up by the Employees' Representative Committee. In November, it adopted a resolution, critical of the doctor. It and company officials conferred with the doctor. The

situation was not cured. There were further conferences with the Employees' Representative Committee, unfulfilled promises to improve, and additional complaints. The situation got progressively worse. Respondent's conduct became erratic and bizarre. In January, petitioner took steps to find a new doctor.

Respondent's inattention to duty and complaints from patients and nurses continued. Because of respondent's conduct one registered nurse resigned on February 14, 1948. On March 31, 1948, due to respondent's behavior, the registered nurse who had been head nurse at the hospital since its inception resigned and the hospital was without a registered nurse for 22 days. Two new registered nurses came in. Still the hospital was not operated properly. The men at the mill began circulating a petition to have the doctor removed. Respondent's employment was terminable on 60 days notice (Ex. No. 10, 11, R 225, 232) and finally, on April 30, 1948, petitioner was forced to give respondent 60 days notice of termination (Ex. No. 2, R 196).

Immediately thereafter, in the early part of May, respondent performed an operation on a Mrs. Bishop in which there was a shocking want of proper technique and care. *On May 13, the doctor performed an operation on a Mrs. Wood in which he removed a living fetus—which, by his own admission he later secreted in his apartment, placed in a pickled peach jar and buried in the ground.* His own testimony was that he did not know that the woman was pregnant. But see Judge Pope (App. A, p. 7)—"One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation".

On the morning after the Wood operation, the head nurse made a complete report to the company officials and also stated that respondent was contemplating a similar operation on another pregnant woman in the hospital. We make reference here to Judge Pope's judicial statement as to the sequence of events (App. A, p. 7 ff.):

> "The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.
>
> It was following this report that the company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at once. It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.
>
> The charge of slander arises out of these remarks. At first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near

other outside doors of the apartment to prevent the doctor from leaving the apartment at all. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite".

Judge Pope further states "The evidence of imprisonment was exceedingly flimsy".

As to the claimed slander, in addition to the above characterization of respondent's "mad surgery", four disinterested graduate registered nurses gave detailed testimony regarding respondent's inexplicable and frequent erratic and eccentric conduct and demeanor. This testimony—corroborated by many other witnesses—was neither denied nor impeached in any manner.

In this connection Judge Pope found (App. A, p. 9)

"But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was

true, *there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.*

I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking. . . .

I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous." (Emphasis ours).

There was not a word of testimony which would support any finding of damage in fact. The chief actor in the episode over the weekend of May 14-16, 1948, for petitioner, was its Executive Vice-President, Mr. Bradley. The jury returned no verdict as to him and by stipulation the case was disposed of in his favor.

The jury, however, returned a verdict of $60,000 against the petitioner corporation—Why? The obvious answer of jury prejudice against the company lies in the tactics of respondent's counsel.

During the whole course of the trial the attorneys for respondent, in cross-examination ostensibly for the purpose of impeachment, introduced matters derogatory of petitioner before the jury—for which there was no evidence—for which they never attempted to produce any evidence—thus introducing by "impeachment" highly inflammatory matters whose only purpose could have been to create jury prejudice.

See Judge Pope (App. A, p. 10):

> "In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record."

This "isolated instance of trifling consequence" was the interjection of religious prejudice on cross-examination carrying the totally unsupported insinuation that the mine manager had, in a conference with respondent, rejected an applicant for head nurse on the ground that she was Jewish and a Jewish refugee (R 1602, 1603):

> "Q. She was a **Jewish refugee**, was she not?
>
> A. I don't know.
>
> Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?
>
> A. No, sir.
>
> Q. You don't recall saying that—saying that inasmuch as she was **Jewish**, and a **Jewish refugee**, that she would not fit into the life at Stibnite and that you may as well forget her?
>
> A. Nothing was said about being Jewish."

In a footnote, the majority stated (App. A, p. 3):

> "In one instance, it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time".

But how effective is an objection to cross-examination whieh apparently is for *impeachment* purposes? See the following cross-examination of Mr. Zarybnisky (R 1418, 1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

"A. I don't remember.

Mr. Breshears: We object to this, there is no connection with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*

The Court: *You may ask for that purpose.*

Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*

A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Ccunsel's purpose

was obviously without foundation, to get over the effect of the *question* to the jury.

It is conceivable that one or two instances of inadvertent improper and inflammatory conduct could be overlooked. But the record in this case contains more than 50 similar appeals to passion and prejudice under the guise of "impeachment". Record references to these are set forth in Appendix B attached hereto. Judge Pope's opinion cites 20 specific examples and his conclusion is (App. A, p. 11 ff.):

> "The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury. . . .
>
> Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. . . .
>
> The important fact is that this highly prejudicial matter was improperly before a jury which had produced a very large verdict. It serves to account for the size of the verdict. . . . It is all of the same stripe

as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an excessive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one". Minneapolis etc. Ry. v. Moquin, 283 U.S. 520".

Judge Pope's finding of the existence of appeals to passion and prejudice is actually confirmed by the majority panel opinion—see App. A, p. 3:

"The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce

it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury."

The short answer to the brushing off by the majority of these inflammatory jury appeals is that respondent's counsel did *not* produce evidence to support *any* of these numerous "impeachments".

Furthermore, we urge that every litigant is entitled to a fair and impartial trial; that verdicts of jurors should be rendered only on the issues made by the pleadings and the evidence, and that—where prejudicial and inflammatory matter is injected into a record and appeals made to passion and prejudice—it cannot be assumed that jurors are not misled thereby.

We also urge that such misconduct having *any* tendency to inflame the jury should not be approved—the test should be not that the prejudicial matter had a "*substantial* tendency to inflame", but that it had *any* tendency to do so.

With deference to the majority, we submit that it is difficult to conceive of any more flagrant or "substantially inflammatory" appeals to jury prejudice.

The trial judge, in passing on the motion for new trial, misconceived his functions,—assumed that it had no power or function to pass on the facts and assumed that its function was like that of an appellate court. (This is made clear by an earlier order reversed in *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (Circ. 9) decided after denial of the motion for new trial in the case at bar.)

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ should be granted for the following reasons:

1. The court below has decided an important question of federal law,—that courts of appeal should afford no relief where an excessive verdict in a federal court has resulted from improper appeals to passion and prejudice by members of the bar of a federal court in the course of the trial of a case,—in a way which is in conflict with *Minneapolis etc. Ry. Co. v. Moquin,* 283 U.S. 520, and *N. Y. C. R. Co. v. Johnson,* 279 U.S. 310. (Rule 38, 5(b).)

2. The court below has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure as to call for the exercise of this court's power of supervision (Rule 38, 5(b); see *Thiel v. So. Pac. Co.,* 328 U.S. 217, 225).

3. The petitioner was deprived of an essential element of trial by jury when the trial judge declined to exercise his independent judgment on the facts.

About two things there can be no question. (1) Excessive verdicts, or otherwise improper verdicts, resulting from appeals to passion and prejudice cannot be permitted ~~to~~ by stand. The *Johnson* and *Moquin Cases* put this beyond question. (2) There was, in this case, a planned and consistent course of appeal to passion and prejudice, indulged in by counsel for respondent. Judge Pope's opinion finds and documents this. The majority opinion concedes it. The only difference between the majority and the dissent was that the majority indulged in the assumption that these appeals had no effect upon the jury. The assumption flies in the face of the monstrous verdict and the judgment of

the men who tried the case, the attorneys for respondent who carried out a planned course of campaign. They did not do this because they assumed it would have no tendency to influence the jury. The only question is whether this is a matter of sufficient importance, in the administration of justice in the federal courts, for this court to review the matter. We believe it is and that this court, in forthright terms, should announce that where there is a planned course of action upon the part of lawyers trying a case to appeal to passion and prejudice, and influence the jury by derogatory and inflammatory matter, the tendency of such conduct is so dangerous that an appellate court should not be permitted to speculate that it may not have affected the jury.

It will serve nothing to spend time and effort in working out appropriate rules of substantive law if in their actual administration they are to be prostituted by denying to a party the right to have them impartially applied in a fair trial. Here is a case where action is necessary for the purpose "of correcting an absolutely plain injustice, in the interest of judicial administration itself." (*Louisville & N. R. Co. v. Botts,* 173 F.2d 164, 170 (Circ. 8).) The matter is of importance which far transcends this case. It goes to the very heart of the administration of justice. No verdict would be permitted to stand against a party if he were deprived of the right to be represented at the trial by counsel. That right involves the right to be properly and adequately represented. A party is not so represented if his opponent is permitted to obtain a verdict by methods which have been condemned repeatedly.

Moreover, a party whose case is tried by a jury, is deprived of his full rights to a trial where the trial court,

misconceiving its function, does not, on motion for new trial, exercise its own independent judgment upon the case as matter of fact. This is its function and duty, and its function and duty is wholly unlike that of an appellate court. (*Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251; *Capitol Traction Co. v. Hoff,* 174 U.S. 1; *Pleasants v. Fant,* 22 Wall. 116; *Aetna Casualty & Surety Co. v. Yeatts,* 122 F.2d 350 (Circ. 4); *General etc. Ins. Co. v. Central Nat. Bk.,* 136 F.2d 821, 823 (Circ. 6); *Reid v. Maryland Casualty Co.,* 63 F.2d 10, 12 (Circ. 5).) Where the trial court fails to perform its function it is guilty of an error of law which should be corrected on appeal. (*Felton v. Spiro,* 78 Fed. 567, 581 (Circ. 6—opinion by Taft, Lurton concurring, both later members of this Court); *General etc. Ins. Co. v. Central Nat. Bk.,* above; *Virginian Ry. Co. v. Armentrout,* 166 F.2d 400, 408 (Circ. 4). In this connection see Judge Pope's opinion, App. A, p. 13, note 8.)

This too is a matter of transcending importance in the administration of justice. Where the trial judge misconceives and, by consequence, does not fulfill his function there is departure from the accepted and usual course of judicial proceedings.

The record made in this case is clearly set forth by Judge Pope in his dissent, and unless this court in the exercise of its supervisory power over the administration of justice announces the rule that such conduct on the part of counsel for a litigant deprives the injured party of a fair and impartial trial and is grounds for reversal, it will be impossible to make the claim in any case that a record contains a basis for asserting that a verdict was induced by appeals to passion and prejudice.

The rule of the Ninth Circuit as promulgated by the majority of the panel deciding this case amounts to nothing less than a license which will permit counsel for a litigant in all cases to violate the rules of common honesty in the trial of a lawsuit and still be allowed to retain the fruits of his wrongdoing.

Settlement of the question by this court is plainly in the public interest since it could be involved in every trial.

The matters which we have presented are plain. The rules should not be permitted to be whittled away piecemeal. We suggest, with deference, that the function of this Court is not fulfilled by the mere announcement of rules. It has a responsibility to see that they are administered properly—to prevent a plain miscarriage of justice and abuse of process. This case appeals to that responsibility. We suggest that this Court should issue its writ of certiorari, as prayed.

Dated: March 11, 1952.

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRADLEY MINING COMPANY, a Corporation,
Appellant,
vs.
EDWARD H. BOICE,
Appellee.

No. 12,684
Dec. 5, 1951

Appeal from the United States District Court, for the District of Idaho, Southern Division

BEFORE: HEALY, BONE, and POPE, Circuit Judges

HEALY, Circuit Judge

This appeal is from a judgment against appellant in the amount of $60,000 in a suit claiming damages for slander and false imprisonment.

Much of appellant's argument here has been given over to factual contentions. The district judge in an opinion denying a motion for a new trial outlined the testimony supporting the verdict, 92 F. Supp. 750, and there is no occasion for our going over the same ground. All that need be said is that the evidence was such as to make the question of liability one for the determination of the jury. But appellant argues that in the form returned the verdict must be taken as a finding against appellee on all essential facts. Before turning to other points we will notice this claim.

In addition to the corporate appellant, its executive vice president, John Bradley, was made a defendant in the case. Bradley was personally in charge of all the Company activities giving rise to this suit. The verdict returned was against the Bradley Mining Company alone. It made no mention of John Bradley, either one way or the other. In this posture of affairs the court inquired of counsel whether they desired the jury to be returned to their room

to clear up their verdict as regards Bradley. Both sides replied in the negative.

Counsel's point here is that the case was decided by the jury in favor of the defendant Bradley, hence all questions of fact which were touched by his activities have been determined against appellee. No Idaho authority is cited in support of the argument, nor are there any citations of analogous decisions from other jurisdictions. Appellee calls attention to the California case of Lloyd v. Boulevard Express reported in 249 P. 837. The situation there was in principle on all fours with the present. The corporate defendant was held liable by the jury but no verdict was returned against its active and responsible agent, Mitchell, who was also a defendant. The court remarked [p. 838] that "the jury did not find either for or against Mitchell. It is the settled law in this state that the verdict of a jury against one of two defendants is not a verdict in favor of the other defendant. Such a verdict indicates simply that the jury failed to find upon the issues." The court added that since the corporate defendant noticed the omission and did not ask that the jury be required to find on the issue, it could not now be heard to complain. The California rule would probably be followed in Idaho.

Appellant's principal argument aside from an appeal to the evidence appears to be that the verdict was excessive and was arrived at as the result of passion and prejudice. There was enough evidence, certainly, if believed, to warrant the imposition of general damages in more than a nominal sum, both on the issue of false imprisonment and on the slander issue. Appellee produced testimony that armed guards were for a number of hours placed about his apartment with the view of circumscribing his movements. Consult in this connection Griffin v. Clark, 55 Idaho 364. Charges of insanity and of the performance by appellee of an illegal abortion—charges obviously slanderous per se—were testified to have been made in the presence of members of the general public under circumstances which the jury might properly have found rendered them unprivileged. Too, the jury might fairly have inferred from the record that appellant acted with actual malice, both in respect of appellee's imprisonment and in respect of the slanderous statements of its representatives. Concededly, under the local rule, the existence of malice in fact in a case like this warrants the imposition of punitive damages.

Apart from the mere size of the verdict, the claim of passion and prejudice is predicated on questions put to several of appellant's witnesses in the course of cross examination. These questions consist mainly of inquiries whether the witness under interrogation had or had not made a certain statement tending to impeach his testimony.[1] In each instance the witness denied having made the statement. The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it. In sum, the instances of claimed misconduct cited are not thought to have had a substantial tendency to inflame the jury. The cause was submitted to them under elaborate instructions carefully defining the applicable law in terms as favorable to appellant as it could reasonably have asked. There were no objections to the charge on appellant's part.

The power of this court in respect of verdicts claimed to be excessive is not coextensive with that of the district court. At most we may consider only whether the verdict is grossly excessive or "monstrous." Southern Pacific Company v. Guthrie, 9 Cir., 186 F. 2d 926, 931-33. When the trial judge is presented, as the judge was here, with a motion for a new trial grounded on a claim of excessive verdict, his power to deal with such a claim is not limited as ours is to questions of law. He may set aside a verdict when he thinks it is against the weight of the evidence or for other reasons he deems sufficient. In this instance the judge, familiar with the atmosphere of the trial and sensible of imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive. On the record before us, certainly we can not say that he was wrong.

Counsel argue that the court prejudiced their case by criticizing a hypothetical question propounded to medical witnesses whose

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[1]In one instance it is claimed that counsel attempted to inject a religious issue in the course of cross examination. We have considered this incident and regard it as of no more than trifling consequence. In any event it was not objected to at the time.

opinion was sought as to whether appellee had practiced medicine in accordance with standards obtaining in Idaho. The hypothetical inquiry was unusually lengthy. The court in the presence of the jury expressed the belief that it included a number of matters that could be of no aid to the witnesses in forming an opinion. Counsel now say that the court's remarks "not only destroyed the value of the expert medical testimony given in response to the hypothetical question, but also discredited the supporting testimony which practically constituted appellant's entire defense." Yet counsel made no such suggestion at the time or indeed at any time while the case was before the district court. They did not ask that a mistrial be declared, nor did they subsequently advance the remarks of the court as a ground for granting their motion for a new trial. We have nevertheless studied the hypothetical question and considered the judge's comments concerning it. The comments, we think, were not unwarranted. The question propounded appears argumentative, and it included, as the court observed, a number of matters that could not conceivably be of aid to a medical man in forming an opinion on the subject inquired about. Moreover the judge instructed the jury to disregard his remarks.

One other point will be noticed briefly. Appellant is a California corporation doing business in Idaho, and its co-defendant, Bradley, is a resident of California. The complaint alleged and the answer denied that plaintiff is a citizen and resident of Idaho. It is argued that no proof whatever was offered as to his being a citizen of that state or any other state, hence the requisite diversity was not shown.

There was no proof directed immediately to the issue, but we think it sufficiently appears from the record as a whole that appellee was domiciled either in Idaho or in Texas.[2] The evidence is that he was raised in the latter state and after schooling was admitted to practice medicine there. During the second world war he entered the armed services and was discharged in October 1946, after which he sought a location in the northwest. In January of 1947 he entered into a contract of indefinite duration with appellant to take charge of the latter's hospital at Stibnite, Idaho. Following the making of this arrangement he returned to Texas to

[2]The whole record may be looked to on this subject. Sun Printing & Publishing Assn. v. Edwards, 194 U. S. 377. There was enough proof, we think, to satisfy the jurisdictional requirement.

get his wife and children and to await the effective date of his employment, which was to be March 1, 1947. At that time he removed to Stibnite with his family and possessions, and resided there until May 15, 1948, when his contract was terminated by the company. At the inception of this employment he had applied for a license to practice medicine in Idaho and later was licensed by the state as a physician and surgeon. It casually appears from various items of evidence in the record that following his discharge at Stibnite he resided in Boise, where he was living at the time this case was filed and thereafter. Proof of residency in a state is usually thought prima facie evidence of domicile sufficient to shift the burden of proof. Cf. Kelleam v. Maryland Casualty Co., 112 F. 2d 940; Sherman v. Roosevelt Co., 48 F. Supp. 434; Tudor v. Leslie, 35 F. Supp. 969.

Affirmed.

POPE, C. J., dissenting.

The circumstances which gave rise to this action took place in connection with the termination of the employment of the appellee, a physician and surgeon, who had been employed by the Bradley Mining Company. The Mining Company operated mines at Stibnite, a remote mining town located in the mountains of Idaho. It had a contract with its employees under which it arranged to provide hospital and medical care not only in cases arising out of industrial accidents, but in all cases of illness of the employees or any members of their families. To accomplish this it had established and equipped a hospital, and Dr. Boice, the appellee, had been employed to manage the hospital and to provide the medical and surgical care required. The appellee was the only physician in the community.

The work in the hospital was handled by a number of nurses, selected by the doctor, but paid by the Mining Company, and there were generally at least two who were graduate registered nurses. Dr. Boice and his family were furnished an apartment which was directly connected with the hospital.

At the time of the trial all of the graduate registered nurses, who had been employed in the hospital during Dr. Boice's management, testified. At that time none of them was any longer employed

by or connected with the hospital or the Mining Company. Their testimony was all to the effect that it was exceedingly difficult to get the doctor to see patients who came to the hospital for advice or treatment; that on many occasions he refused to see or interview such patients; that on occasions employees injured in serious industrial accidents were brought to the hospital and the doctor refused to go near them for the period of several days; that he did not make regular rounds of the hospital to inspect those hospitalized there; that he insisted in giving oral directions for treatment and medication to the practical nurses and generally declined to give such instructions either to the head nurse or other graduate registered nurses in writing or by entries on the charts; that while he thus absented himself from the hospital he remained in his apartment and refused to see patients even when the nurses sought him out and requested his presence. During such times his wife, who was neither an employee nor a physician, made the hospital rounds in her husband's stead and undertook to give orders for treatment of the patients. The nurses testified as to how the doctor would schedule operations for morning hours, and then, after the patient had been prepared and wheeled into the operating room at the appointed time, the doctor would not appear until long after noon, and sometimes not at all on the appointed day.

The nurses testified that when it was necessary to procure directions from the doctor, they would proceed to the apartment in order to talk to him and that frequently the doctor was in the bathroom with the door closed, where he remained for long periods of time, and that they had to consult with him through the closed bathroom door. The nurses complained to Dr. Boice about the difficulty of procuring proper directions and about his refusal to see inmates and callers at the hospital but the situation did not improve. At times when the doctor was in the hospital and he was approached by a nurse in order to have him interview a patient, he climbed out of the window to get away from the nurse and avoid the interview. Some of the nurses furnished additional details, such as the doctor's permitting his children, his dog, and his pet ducks to wander about the hospital.

Finally, some of the nurses reported the unsatisfactory condition to the Mining Company officers stating they proposed to resign. They were requested to stay until some replacement could be found

for Dr. Boice. The contract of employment provided for termination of his two year term at any time on 60 days notice, and on April, 1948, he was given such notice.

Early in the following month he performed an operation said by him to be exploratory in character upon a woman who he said was suspected of having malignant cancer or tumor of the uterus. One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation. He performed a hysterectomy and removed the uterus which was found to contain a fetus which moved and kicked. The doctor admitted that he had not known that the pregnancy existed when the operation was performed, and the only point in controversy with respect to this operation was as to whether it was a six month or only a three month old fetus. The graduate registered nurses who were present and who saw the fetus and who had some years of training and experience in obstetrical techniques, testified that it was apparently a six-month fetus. The doctor proceeded immediately to dissect the uterus. The nurses were present as was a four year old child of the doctor during this procedure. Immediately thereafter the specimen disappeared and although in a short while much controversy arose about the operation, the specimen was not exhibited to any other person. The doctor admitted that he kept it in alcohol until after he left Stibnite, and that he buried it in the vicinity of a ranch where he stopped on his way out following his discharge.

The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.

It was following this report that the company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at

once.[1] It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.

The charge of slander arises out of these remarks. At first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near other outside doors of the apartment to prevent the doctor from leaving the apartment at all. The doctor himself testified that there were guards on those other sides of the apartment, but his wife gave no such testimony and other persons who were there saw no guards other than the one at the entrance of the hospital.

The charge of false imprisonment is predicated upon this claim that the apartment was surrounded by guards, and that when Dr. Boice and his family drove out of town the following Sunday night, an employee of the company followed to make sure that they did leave. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite.

I have no difficulty in going along with the majority and with the trial judge upon the proposition that there was some evidence to prove an imprisonment[2] and that the defamatory remarks made in the presence of the Health Department representatives could be said to have been made before persons with respect to whom the rule of privilege would not operate.

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[1]Stibnite was a "company town" in the sense that substantially all of its inhabitants were company employees and their families, and substantially all of the houses and buildings were company owned.

[2]The evidence of imprisonment was exceedingly flimsy. I do not think there was any, but of course I am not a fact finder here.

But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation.[3] What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.

I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking.

The testimony of these nurses did not stand alone. It was corroborated by the testimony of several of the practical nurses, and the doctor's inattention to his work and many of the inexplicable aspects of his often erratic and eccentric conduct and demeanor were testified to by many former inmates of the hospital. Many of these patients were at the time of the trial either company employees or members of their families, but it is noteworthy that in general the circumstances related by them were not denied. The doctor himself was not called upon rebuttal after all this testimony had been adduced.

I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous. As I read the testimony I think it is apparent that when Dr. Boice was told to leave, the officials of the company who talked to him were not only alarmed but had become so excited that

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[3] "In the actions mentioned in the last section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." Sec. 5-811, Idaho Code.

under the circumstances their method of approaching the doctor and demanding his departure was more abrupt and undiplomatic than it needed to be. I think that the only circumstances from which malice could be inferred in order to support an award of punitive damages is this unnecessarily harsh method of putting pressure upon him to leave, but I assume that there was sufficient evidence of malice to sustain an award of punitive damages, although the inference of lack of malice, I believe, is the stronger. Even assuming a permissible inference of malice, I think the award a monstrous one, wholly apart from the circumstances which I am about to mention.

In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record.

For instance, appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. Thus Miss Morton, the nurse who had reported the operation to the company officials, was asked: "Miss Morton, immediately after your arrival on the 29th of April or the next day, or within a day or two, you started to criticize Dr. Boice to other nurses, did you not?" She was also asked: "Were you not also talking to the patients and criticizing the doctor's treatment of the patients?" Both of these questions were answered "No, sir", and in answer to the second, the witness said "I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients". Now, if counsel was possessed of any evidence of any such conduct on the part of Miss Morton as that suggested by the question, which would have tended to show substantial bias on her part, proof of that fact would have been admissible. Collinger v. United States, (7 cir.) 50 F. 2d 345; United States v. Beekman, (2 cir.) 155 F. 2d 580; 3 Wigmore Evidence (Third Edition) §1022. But no such testimony was adduced.

If only those two questions were involved, it is clear that their asking would be entirely proper, whether followed by other proof or not. I think it would be taken that counsel would be presumed to have asked them in good faith.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury.[4]

The cross-examination of the other nurses followed the same pattern.[5] It was extended to other witnesses. A guard stationed at

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[4]Thus, still proceeding with the cross-examination of Miss Morton, she was asked: "Didn't you tell Mr. Provost [a hospital patient] that he should sue the doctor for malpractice?" Also, she was asked: "When the doctor asked you to leave didn't you tell him at that time that you were not working for him, and that he could not fire you, that you were working for Mr. Bailey?" Also: "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" In each case the answer was in the negative. Some of the suggestions in these questions to Miss Morton were repeated in questions to other nurses. Mrs. Anaruk [formerly Miss Haskins] was asked: ". . . Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" The same witness was asked if Miss Morton had not told her she was hired "for the purpose of constantly checking on Dr. Boice and reporting back to [company officers]". Mrs. Richardson was asked: "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?"

[5]Nurse Anaruk was twice asked whether she had not, shortly after Dr. Boice left, stated to one Faye Anderson, that she "had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents", and that she was going to quit because she "did not like the way they treated Dr. Boice". Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known". Nurse Kirshner was asked if she had not made two purported statements. If these statements had been made they would have indicated that this nurse told a Mr. Sims, while he was in severe pain, to get up and get out of the hospital, and that she made a similar statement to a Mrs. Baker, hospitalized for hypertension. The same nurse was asked if

the hospital door was asked about a conversation with a Mr. and Mrs. Ross. He was then asked: "Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guard, and that you had instructions to shoot him down like a dog if he got funny?" Martin, the county attorney, was asked on cross-examination if he did not state to Dr. and Mrs. Boice that "it was silly for them to fight Mr. Bradley and his money."

These instances will serve to illustrate the method of cross-examination adopted by the doctor's counsel. Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in the belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. As the Supreme Court of Montana said of a somewhat similar procedure, "Manifestly it was the questions and not the answers which counsel considered important." State v. Patton, 102 Mont. 51, 59, 55 P. 2d 1290, 104 A.L.R. 76. Cf. United States v. Nettl, (3 cir.) 121 F. 2d 927.

When the evidence came to a close and it then became apparent that appellee did not intend to produce witnesses to prove the statements thus insinuated in the questions, appellant might well have moved the court to direct the jury to disregard the questions. The Idaho court has held that without such a motion, the asking of the questions, or the failure of the court so to instruct, is not ground for a reversal,[6] although that court has labeled such a procedure as that indulged in by appellee's counsel here, as "unfair

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there was not friction between herself and the head nurse, Mrs. Johnson. Nurse Johnson was asked if she had not said of Nurse Kirshner that the latter "was in disgrace in the nursing profession".

[6]But as to whether, at such a late hour in the trial, the effect of the questions could be removed by an admonition, see United States v. Grayson, (2 cir.) 166 F. 2d 863, 871, Waldron v. Waldron, 156 U. S. 360, 383.

to a defendant", a practice which "ought not to be indulged in under any circumstances", State v. Boyatt, 59 Ida. 771, 784, 87 P. 2d 992, and as a "reprehensible practice", State v. Flitton, 52 Ida. 374, 378, 15 P. 2d 397.[7]

But as I read this record, I think it immaterial whether appellant, by not making such a motion, lost the right to demand a new trial for misconduct of counsel as such. The important fact is that this highly prejudicial matter was improperly before a jury which has produced a very large verdict. It serves to account for the size of the verdict. It is all of the same stripe as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an excessive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." Minneapolis etc. Ry. v. Moquin, 283 U. S. 520.[8]

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[7]In a lengthy effort to justify his procedure, appellee cites decisions to the effect that the purpose of cross-examination is to show bias, to show previous contradictory statements, to place the witness in his proper setting, to modify or explain the testimony, etc. It is claimed that the cross-examination here was to show these things. The fallacy of that argument here is that none of those things were shown. They were only insinuated.

[8]I think, also, there is a nice question whether the trial judge did not erroneously refuse to exercise his discretion to grant a new trial, because he mistook his power to do so in a case where the verdict is against the weight of the evidence. In his opinion denying a new trial, after refer-

In my opinion a very thin case has here been whipped into a monstrosity. I think a new trial should be ordered.

(Endorsed:) Opinion and Dissenting Opinion. Filed Dec. 5, 1951, Paul P. O'Brien, Clerk.

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ring to the Constitutional right of trial by jury, he said: "If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury." This sounds like the statement of the trial court which led to reversal in Felton v. Spiro, (6 cir.) 76 F. 576, which was cited with approval in Fairmount Glass Works v. Coal Co., 287 U. S. 474, 481. The Constitutional right to trial by jury, mentioned by the trial judge, includes the right to a trial under the direction of a judge empowered to grant a new trial when he believes the verdict is against the weight of the evidence. Capital Traction Co. v. Hof, 174 U. S. 1, 13. This is "one of the historic safeguards of that right." Aetna Casualty & Surety Co. v. Yeatts, (4 cir.) 122 F. 2d 350, 352. Cf. Southern Pac. Co. v. Guthrie, (9 cir.) 186 F. 2d 926, 932.

Appendix B

EXAMPLES OF INFLAMMATORY CROSS-EXAMINATION BY COUNSEL UNDER GUISE OF IMPEACHMENT

The numerous examples of inflammatory "impeachment" cross-examination, not followed up by counsel have been referred to in part in our brief, supra. For convenience in checking the record, these examples are set forth in this Appendix with citations to pages in the transcript.

(1) The interjection of religious prejudice into the cross-examination of Mr. Bailey, the mine manager, (as to a nurse applicant being turned down because she was a Jewish refugee) is mentioned in our brief—a full record statement of this follows — this took place during the cross-examination by appellee's counsel of Mr. H. D. Bailey relating to a conversation between Mr. Bailey and the Doctor regarding the hiring of Miss Morton, the head nurse (1602, 1603):

"Q. What did you do at the office after you got there with Dr. Boice?

A. The Doctor asked my opinion of the three nurses, and I told him that it was his affair, that he had to work with them, that it wasn't my affair at all.

Q. Did you go over the applications?

A. I didn't see the applications—he talked with them informally; there were no formal applications.

Q. Did he discuss their qualifications with you?

A. No, I don't think so.

Q. Do you recall Miss Hirst that was brought in?

A. I think she was one—she may have been there.

Q. She was a **Jewish refugee,** was she not?

A. I don't know.

Q. You remember the Doctor told you that in addition to her training that she had three years of medical training?

A. No, I don't remember that.

Q. And that she would be a valuable asset, would be a help to them?

A. As I recall the Doctor said Miss Morton had the better qualifications.

Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?

A. No, sir.

Q. You don't recall saying that—saying that inasmuch as she was **Jewish**, and a **Jewish refugee**, that she would not fit into the life at Stibnite and that you may as well forget her?

A. Nothing was said about being Jewish."

Counsel put on no witnesses to testify to the above comment and Respondent himself did not take the stand on rebuttal.

Many other instances of similar cross-examination occur in the record—some amounting to testimony by counsel under the guise of impeachment, and others of unquestionable impeaching character—all without foundation in the record, with no attempt at substantiation by counsel. It is obvious, therefore, the counsel intended throughout cross-examination to influence the jury by reckless and groundless inflammatory cross-examination—substituting in effect counsel's own testimony for respondent's case.

(2) See the cross-examination of Mr. Zarybnisky (1418-1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

A. I don't remember.

Mr. Breshears: We object to this, there is no connec- with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*

The Court: *You may ask for that purpose.*

Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*

A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Counsel's purpose was obviously without foundation, to get over the effect of the *question* to the jury.

(3) Mr. Martin, the Valley County prosecuting attorney, was asked "Did you state it was silly for them to try to fight Mr. Bradley and his money?" (1326);

(4) Mrs. Keele, the Boices' housekeeper, was asked "Did you at a time in May of 1948, know that Mrs. Boice was *pregnant?*" (760).

Neither respondent nor Mrs. Boice, nor anyone else, testified as to any such pregnancy—nor is there anything

whatever in the record to indicate that the officials of the company were told, suspected, or knew of any such condition, if in fact it existed. This is another highly inflammatory instance of counsel's blueprint for prejudicing the jury.

Attention should be called here to the uncontradicted and unimpeached testimony of four graduate registered nurses and several practical nurses—and to the "impeaching" tactics of counsel. As to this see Judge Pope's comment (App. A, p. 9 ff):

> "But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties. . . . Appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. . . . But no such testimony was adduced.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury."

(5) Counsel's "impeaching" tactics reached a reckless peak in order to discredit Miss Morton—obviously due to the fact that she, as head nurse ~~for~~ with 17 years of wide experience, divulged to management facts which led the company to act immediately to complete the April 30th termination of respondent's employment. In addition to the examples given above, see the following "discredit by question" without any foundation (1025):

"Q. Miss Morton, immediately after your arrival on the 29th of April, or the next day, or within a day or two, you started to criticize Dr. Boice to the other nurses did you not?

A. No, sir.

(6) Q. Were you not also talking to the patients and criticizing the doctor's treatment of the patients?

A. No, I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients." (1025)

Further steps were taken to introduce a "company spy" theory with regard to nurses to prejudice the jury—
(7) "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" (Miss Morton 1022);
(8) "When the doctor asked you to leave, didn't you tell him at that time that you were not working for him and

that he could not fire you, that you were working for Mr. Bailey?" (Miss Morton 1113, 1114);

(9) "Is it not a fact that Miss Jeanne Morton stated to you during the period of your employment at Stibnite, that she was hired as head nurse ~~for~~ by B. F. Mahoney and H. D. Bailey for the purpose of constantly checking on Dr. Boice and reporting back to them?" (Mrs. Anaruk 1152).

(10) Mr. Mahoney, the personnel manager, was asked "As a matter of fact at times when nurses were employed there and got their slips from you, you told them to watch what was going on and report to you?" (487)

(11) "Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" (Mrs. Anaruk 1149)

(12) "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?" (Mrs. Richardson 1228)

To inflame the jury against the nurse witnesses—see

(13) "Didn't you tell Mr. Provost that he should sue the doctor for malpractice?" (Miss Morton 1025);

(14) "Had you, prior to May the 14th, 1948, known that there was a great deal of friction between Miss Morton, Dr. Boice and some of the nurses in the hospital?" (Mr. Mahoney 514);

(15) "Was it in the doctor's orders that he (Mr. Sims) was to receive this sedative for relief * * * didn't you refuse to give it to him?" (Miss Kirshner 833, 834);

(16) "Isn't it a fact that you told her (Mrs. Baker—a patient) in the presence of Helen Christensen, one of the nurses up there, that she should get out of the hospital,

that there was nothing wrong with her?" (Miss Kirshner 852);

(17) "Shortly after Miss Kirshner arrived at the hospital, do you recall telling Helen Christensen that she was in disgrace in the nursing profession?" (Mrs. Johnson 963);

(18) "Is it not a fact that Mrs. Bishop (the surgery patient in May, where plaintiff did not change his torn glove) had knowledge that Bradley Mining Company desired to terminate Dr. Boice's services, and that she insisted that Dr. Boice perform the operation prior to his leaving Stibnite?" (Mrs. Anaruk 1149);

(19) "Is it not a fact, that after the employment of Dr. Boice was terminated by the Bradley Mining Company you stated to Faye Anderson, within a few days thereafter, that you had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents?" (Mrs. Anaruk 1146);

(20) "Is it not a fact that you told Faye Anderson, in the presence of other practical nurses, within a few days after Dr. Boice's termination at the Stibnite hospital, that you were going to quit your employment with the Bradley Mining Company because you did not like the way they treated Dr. Boice and that you wanted no part of a hospital setup where such a thing could happen?" (Mrs. Anaruk 1146).

(21) Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known." (1189)

Counsel put on no witnesses and no evidence to support or to follow through on the above questions which were denied. The plaintiff himself did not take the stand on

rebuttal, nor did his three nurse witnesses, Faye Anderson Nock, Helen Christensen, or Zina Gubser give one word of testimony to substantiate this "impeachment" cross-examination.

(22) To inflame the jury against the defendant company regarding the placing of guards in the hospital to keep plaintiff from the patients, defendant John Bradley was asked with regard to Mrs. Wood, from whom the fetus had been taken,—"As a matter of fact, as a result of delay in care and being without attention, this patient had a slight infection set in in her wound?" (Mr. Bradley 1837).

Counsel called Mrs. Wood and her husband in rebuttal but did not even attempt to fill in the suggested impeachment.

(23) Counsel went to great lengths to get before the jury a purported conversation between officials of the defendant company in which someone allegedly asked the question "Do you think his word would stand up?", with the answer "No, he is just a common laborer" (319, 345, 1676, 1824, 1943).

There was no showing whatever that this purported conversation—allegedly "overheard" by a witness in another room—had any relation to this case.

The same pattern of suggested and innuendo by cross-examination under the guise of impeachment occurs in at least 30 additional places in the record—there are in all over 52 such examples. See:

Defendant Bradley 1777, 1778, 1779, 1827, 1841; Mahoney —personnel manager—498, 499, 500, 501; Bailey—mine manager—1614, 1615-1619, 1625, 1639, 1640, 1677; Mrs. Keele—plaintiff's housekeeper—758, 759; Nurse Kirshner

852, 853, 854, 855; Nurse Johnson 960, 961, 965; Nurse Morton 1045, 1045-1055, 1077; Nurse Anaruk 1145, 1146, 1147; Nurse Lee 1188, 1189; Mossman—County Sheriff—1261, 1262; Logue—deputy Sheriff—1477, 1494; Dr. Lowe—a psychiatrist flown in by the Company—1962, 1963.

These matters wrongfully injected into the record were so inflammatory and prejudicial that the effect thereof could not have been removed by motions to strike or instructions to disregard. It was not possible to object to the questions asked ostensibly for purposes of impeachment.

If the appellant at the close of the case had moved that these matters be stricken, and the court had stricken each and every one and instructed the jury to disregard the same, such action would have served but to emphasize them.*

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*"Indeed as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more to have the judge tell the jury to ignore it, *often serves but to rub it in.* Judge Frank in *U. S. v. Grayson* (C.C.A. 2) (1948) 166 F.2d 863, at 871.

"It certainly cannot be said that such testimony would not unconsciously affect the verdict however much the jury might be disposed to follow the instructions of the court." (*Lockhart v. U. S.* (C.C.A. 9) (1929) 35 F.2d 905)

Inflammatory matter injected into a record may be so prejudicial that its sting cannot be removed by admonition or instruction. See *Waldron v. Waldron,* 156 U.S. 360, 383.